Filed 6/15/09 Soriano v. Temple-Inland Mortgage Corp. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOEY F. SORIANO et al., Plaintiffs and Appellants, v. TEMPLE-INLAND MORTAGE CORPORATION, Defendant and Respondent.	G039696 (Super. Ct. No. 06CC00051) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Stephen J. Sundvold, Judge. Affirmed.

Baum, Hedlund, Aristei & Goldman, Ronald L.M. Goldman, George W. Murgatroyd III, and Kate E. Gillespie for Plaintiffs and Appellants.

Weiner Brodsky Sidman Kider, Mitchell H. Kider, Nancy W. Hunt; Ben-Zvi & Associates and Henry Ben-Zvi for Defendant and Respondent.

* * *

Plaintiff Joey F. Soriano appeals from a judgment of dismissal entered after he failed to bring his class action to trial within five years of filing the complaint. The court did not abuse its discretion by finding no impracticability excused plaintiff's delay in prosecuting this case. We affirm.

FACTS

Early Procedural History: 2000 to 2007

Plaintiff filed his complaint in Los Angeles County Superior Court on December 18, 2000. He alleged defendant, a mortgage lender, impermissibly collected pre-closing interest from borrowers and failed to timely reconvey deeds of trust after payoff. (Civ. Code, §§ 2948.5, subd. (a), 2941, subd. (b)(1).) He sought statutory penalties and damages on behalf of himself and a class of borrowers.

Typical litigation followed. Plaintiff filed a first amended complaint in late 2000. Defendant filed a demurrer, which led plaintiff to file a second amended complaint in April 2001. Defendant demurred to the preclosing interest causes of action; the court sustained the demurrer in August 2001. Status conferences were set, held, continued, and reset. Plaintiff filed a third amended complaint alleging only the reconveyance causes of action in March 2002. Defendant demurred. The court overruled the demurrer in July 2002 and ordered defendant to respond to outstanding discovery. Defendant petitioned for writ review. The Court of Appeal stayed all proceedings in November 2002 pending its decision, then summarily denied the petition and lifted the stay in January 2003. More status conferences were held. Plaintiff pursued discovery; the court granted its motion to compel in August 2003. Defendant filed a summary judgment motion in December 2003, which the court denied in May 2004, issuing a written order in August 2004.

In the meantime, plaintiff moved for class certification in July 2004. The parties extended defendant's time to respond to the motion, and agreed to a December

2004 hearing. At the hearing, the court found class treatment appropriate but invited additional briefing on plaintiff's adequacy as a class representative. Defendant re-deposed plaintiff's wife, who worked for class counsel and had served as a named plaintiff in one of its class actions. Defendant moved to disqualify plaintiff's counsel.

The court continued the class certification hearing until March 2005, when it found plaintiff was not an adequate class representative. It also denied defendant's motion to disqualify plaintiff's counsel.

The parties wrestled over how plaintiff should locate a new class representative. Plaintiff propounded discovery to defendant regarding possible class members. The court granted its motion to compel responses in June 2005. Defendant petitioned for writ review. The court of appeal stayed all proceedings pending its decision, then summarily denied the petition. Defendant produced the requested discovery in September 2005. Plaintiff mailed court-approved letters to potential class members, locating a willing class representative in Orange County resident Michael L. Bean.

After obtaining leave over defendant's opposition, plaintiff filed a fourth amended complaint in November 2005. The court granted defendant's motion to transfer this case to Orange County in December 2005.

After plaintiff peremptorily challenged the initial Orange County Superior Court judge in April 2006, a status conference was set for July 2006. It was continued at defendant's request, and then on the court's motion, until September 2006. Defendant filed a demurrer in October 2006, set for hearing the next month. The court vacated the hearing date, then continued it with the parties consent until January 2007. The court sustained the demurrer to one cause of action but overruled it as to the others.

Undisputed Extensions and the February 2007 Stipulation

Because "[a]n action shall be brought to trial within five years after the action is commenced against the defendant," ordinarily plaintiff would have had to bring the case to trial by December 18, 2005. (Code Civ. Proc., § 583.310.)[1]

The parties agree the five-year statute was stayed or extended three times. (§§ 583.330, subds. (a), (b) [parties may agree to extend time]; 583.340, subd. (b) [time tolled when case stayed].) The litigation was stayed in 2002 and 2003 while defendant's writ petition was pending, and again in 2005 pending defendant's later writ petition. The parties also stipulated after-the-fact to extend the statute to account for the delay in late 2005 to early 2007 while the court considered the motion to transfer and the demurrer to the fourth amended complaint.

The parties dispute the duration of an extension connected to a May 2001 status conference. In a June 2001 status conference report, plaintiff stated, "At the last status conference, the Court permitted discovery to go forward on the preclosing interest issues, but not on the Civil Code § 2941 issues pending action by the [L]egislature. With regard to the proposed legislation to change the substance of Civil Code § 2941 and make it retroactive, the bill has passed the [Assembly] and has been assigned to a Senate Committee. It is unknown when it will be set for public hearing and submitted for a vote. [¶] Plaintiff has commenced discovery regarding the preclosing interest issue, as permitted by the Court."[2] In an October 2001 status conference report, plaintiff stated the

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

[2] In 2001, the Legislature enacted a "clarification of existing law" governing the duty to reconvey deeds of trust. (Stats. 2001, ch. 560, § 3, subd. (f).) It abrogated *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816 (*Bartold*), which held a beneficiary has to request a reconveyance from the trustee immediately upon loan payment, and the trustee cannot meet its duty to record the reconveyance by delivering it after escrow closed to the escrowholder for recordation. (*Id*. at pp. 832, 834; Stats. 2001, ch. 560, § 3, subd. (f).) The Legislature clarified the beneficiary has 30 days to make the

court had "permitted discovery to go forward on the preclosing interest issues, but not on the Civil Code § 2941 issues pending action by the [L]egislature. The Governor has until October 15, 2001 to act on Bill 1090."

The court's minute orders do not indicate any discovery was stayed at the May 2001 status conference. The minute order for that conference mentions no stay. It shows the court set the next status conference for June 2001 and directed defendant to file any "Demurrer to the preclosing interest [claims] by June 21, 2001." At an August 2001 hearing, the court sustained defendant's demurrer to the pre-closing interest causes of action. The minute order notes, "Discovery is *not* stayed regarding the 10th and 11th causes of action" for untimely reconveyance. (Italics added.)

Nonetheless, the parties filed a stipulation in February 2007 regarding the May 2001 extension. It provided: "2. On May 30, 2001, The Los Angeles Superior Court stayed plaintiff's reconveyance claim against Temple-Inland based upon Civil Code section 2941 pending an amendment to the section by the [L]egislature; [¶] 3. On October 5, 2001, the governor signed into law the amendment to Civil Code section 2941; [¶] 4. The Los Angeles Superior Court's stay regarding plaintiff's reconveyance claims expired no sooner than October 5, 2001." The stipulation also referred to the stays pending the writ petitions and the extension pending transfer.

The stipulation specifically addressed the five-year deadline. It provided, "18. The parties agree that the earliest date which could possibly trigger the 5-year dismissal for delay in prosecution pursuant to Code of Civil Procedure section 583.310 is August 25, 2007. Since August 25, 2007 is a Saturday, the parties agree that in this case August 27, 2005 will be the earliest date which could trigger the 5-year dismissal for delay in prosecution pursuant to Code of Civil Procedure section 583.310." The court

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request, and the trustee meets its duty if the escrowholder records the reconveyance as a voluntary accommodation. (Civil Code, § 2941, subd. (b)(1), (7); Stats. 2001, ch. 560, § 3, subds. (b), (c), (d), & (e).)

issued an order stating it "accepts the parties' agreement . . . that the earliest date on which Code of Civil Procedure section 583.310 can be triggered is August 27, 2007."

The February 2007 Stipulation to the August 2007 Dismissal

On the same day the parties filed the stipulation, plaintiff filed a motion to compel responses to discovery requests for information to notify the class. Plaintiff noted "the impending date by which this case was required to be brought to trial" in his moving papers, and successfully applied ex parte to shorten time on the motion.

At the February 23, 2007 hearing on the motion to compel, the court asked plaintiff's counsel what harm would come if plaintiff did not obtain the requested discovery until after it decided class certification. Plaintiff's counsel responded, "The real harm is, on August 28, or August 29th, this defendant is going to file a motion to dismiss our case for lack of prosecution, according to the five-year statute." The court queried, "The statutory loophole that is built in the five-year statute, aren't you going to be standing here saying it is impossible or impracticable for the court to try this case, because we haven't given proper notice to the certified class members? [¶] If that's the only basis that they are making their motion to dismiss under the five-year statute, the court is going to say, absolutely." Plaintiff's counsel responded, "That would be great, Your honor. If I could get that in writing from anyone here, today, I would feel like I accomplished something, today."

Later in the hearing, the court asked about "the current status of the extension of the five-year statute." Plaintiff's counsel stated, "We signed a stipulation . . . that counsel filed, we agreed that the last date on which this case can be brought to trial is August 27, 2007." Plaintiff's counsel later asked the court to set "a definite trial date on calendar, prior to our five year statute, that we can start working with." The court stated, "Actually, the extended date of August 27th, is a Monday, which is our trial date. You want to set it that day, or a week earlier?" Plaintiff's counsel

answered, "I would like a week earlier to account for unforeseen circumstances, Your Honor." The court set trial for August 20. It denied the motion to compel.

Plaintiff filed its motion for class certification the same day, right after the hearing on the motion to compel. The court heard the class certification motion in June 2007, took it under submission, and granted it the next month.

The court held a status conference in July 2007. The court asked about the five-year statute and the extensions due to the writ petitions and the transfer. Plaintiff's counsel stated, "The current stipulation that we have in place now for the statute expiring on the 20th or 29th of August takes into account all of those periods — at least the periods on which counsel could agree, which I can represent to the Court is most of the sort of statutorily mandated or case-mandated stay periods." Plaintiff's counsel noted, "But now we are five weeks from the trial date, six weeks from the date that the parties stipulated for the statute to run." He continued, "And just the nature of a class action, with notice, and all these other issues going on, there's just not physically enough time for us to complete all those activities and bring this case to trial by that date." The court invited plaintiff to file a motion to extend the five-year statute "as soon as it is practicable."

On July 26, 2007, plaintiff filed a motion to declare it impracticable for him to bring the action to trial by August 27, 2007. (§ 583.340, subd. (c).) The court heard the motion on August 17, 2007, denied it, and vacated the trial date.

Defendant moved to dismiss for delay in prosecution on August 28, 2007. The court heard and granted the motion the following month, then entered judgment accordingly.

DISCUSSION

Dismissal for Delay in Prosecution

"An action shall be brought to trial within five years after the action is commenced against the defendant." (§ 583.310.) "An action shall be dismissed by the court . . . if the action is not brought to trial within the time prescribed in this article." (§ 583.360, subd. (a).) "The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute." (§ 583.360, subd. (b).) "The mandatory dismissal statute is founded upon the policy of the diligent prosecution of actions. [Citation.] A plaintiff . . . has the duty '"at every stage of the proceedings to use due diligence to expedite his case to a final determination."'" (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 589 (*Perez*).) "'"[T]he purpose of the [five-year] statute is 'to prevent *avoidable* delay for too long a period.'"'" (*Tamburina v. Combined Ins. Co. of America* (2007) 147 Cal.App.4th 323, 328 (*Tamburina*).)

The parties may agree to extend the five-year period by written stipulation. (§ 583.330, subd. (a).) "[A] stipulation does not have to be justified, that is, based on evidence, and a stipulation often serves to obviate the need for proof." (*Tamburina, supra,* 147 Cal.App.4th at p. 332 [rejecting evidentiary challenges to stipulation].)

The five-year period also excludes any time when "[t]he jurisdiction of the court to try the action was suspended" or "[p]rosecution or trial of the action was stayed or enjoined." (§ 583.340, subds. (a), (b).)

Finally, the five-year period excludes any time when "[b]ringing the action to trial . . . was impossible, impracticable, or futile." (§ 583.340, subd. (c).) "Because the five-year statute is designed to prevent *avoidable* delay, an exception to the statute is recognized where, due to circumstances beyond the plaintiff's control, moving the case to

trial is impracticable for all practical purposes." (*Tamburina*, *supra*, 147 Cal.App.4th at p. 328.)

"The plaintiff . . . bears the burden of proof with respect to the existence of circumstances warranting the application of the impossibility exception." (*Perez*, *supra*, 169 Cal.App.4th at p. 590.) To meet its burden, the plaintiff must show (1) a circumstance of impossibility or impracticality, (2) a causal connection between the circumstance and the delay in prosecution, and (3) it was "reasonably diligent in prosecuting the case at all stages of the proceedings." (*Tamburina*, *supra*, 147 Cal.App.4th at p. 326.)

"This does not mean, however, that every period of time during which it is impracticable for the plaintiff to bring the case to trial is to be excluded from the five-year computation. [Citation.] For example, a plaintiff cannot literally bring the case to trial during the period in which the defendant has the right to answer. And in the course of five years, it is reasonable to expect that counsel will be away from his or her practice at various times due to illness, vacation and the like. [Citation.] Under the five-year statutory deadline, these periods do not constitute circumstances of impracticability that must be excluded in computing the deadline. To read the scheme otherwise would render it 'utterly indeterminate, subjective, and unadministerable, and thus absurd.'" (*Tamburina*, *supra*, 147 Cal.App.4th at p. 329.) Similarly, "the impossibility exception does 'not contemplate "that time consumed by the delay caused by ordinary incidents of proceedings like disposition of demurrer, amendment of pleadings and the normal time of waiting for a place on the court's calendar or securing a jury trial is to be excluded from a computation of the five-year period."'" (*Perez*, *supra*, 169 Cal.App.4th at p. 594.)

Rather, "'[w]hat is impossible, impracticable, or futile is determined in light of all the circumstances of a particular case, including the conduct of the parties and the nature of the proceedings.'" (*Perez*, *supra*, 169 Cal.App.4th at p. 590.) "The determination of whether the impossibility exception applies involves a fact-specific

inquiry and depends 'on the obstacles faced by the plaintiff in prosecuting the action and the plaintiff's exercise of reasonable diligence in overcoming those obstacles.'" (*Ibid*.)

"The determination 'of whether the prosecution of an action was indeed impossible, impracticable, or futile during any period of time, and hence, the determination of whether the impossibility exception to the five-year statute applies, is a matter within the trial court's discretion. Such determination will not be disturbed on appeal unless an abuse of discretion is shown. [Citations.]' [Citation.] [¶] Where a trial court has discretionary power to decide an issue, we are not authorized to substitute our judgment for that of the trial court. [Citation.] Reversible abuse exists only if there is no reasonable basis for the trial court's action, so that the trial court's decision exceeds the bounds of reason." (*Sanchez v. City of Los Angeles* (2003) 109 Cal.App.4th 1262, 1271.)

The Court Did Not Abuse Its Discretion by Dismissing This Case

Plaintiff levies four challenges against the dismissal. None has merit.

First, plaintiff contends the five-year statute did not expire on August 27, 2007. He notes the parties stipulated that August 27 was "the earliest date which could trigger the 5-year dismissal for delay in prosecution pursuant to Code of Civil Procedure section 583.310." He concludes they never agreed the five-year statute would actually expire on that date — just that it would expire no sooner. This twists the words of the stipulation past their breaking point.

And plaintiff consistently told the court the last possible trial date was August 27. At the February 2007 hearing on the motion to compel, plaintiff's counsel argued it needed the requested documents because "on August 28, or August 29th, this defendant is going to file a motion to dismiss our case for lack of prosecution, according to the five-year statute." Plaintiff's counsel later responded to the court's inquiry about the stipulation by stating, "We signed a stipulation . . . that counsel filed, we agreed that the last date on which this case can be brought to trial is August 27, 2007." Plaintiff's

counsel asked the court to set "a definite trial date on calendar, prior to our five-year statute," and asked for a date the week before August 27. At the July 2007 status conference, plaintiff's counsel referred to "[t]he current stipulation that we have in place now for the statute expiring on the 20th or 29th of August," and noted "we are five weeks from the trial date, six weeks from the date that the parties stipulated for the statute to run." Even in his motion to declare impracticability, plaintiff noted "there is about one month before the stipulated 5-year statute date was to run (August 27, 2007)."

Plaintiff is bound by these repeated representations. "[A]n oral statement by counsel in the same action is a binding judicial admission if the statement was an unambiguous concession of a matter then at issue and was not made improvidently or unguardedly." (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752.) Plaintiff's counsel made their representations while informing the court about the stipulation and the impending five-year statute deadline. The representations were clear, deliberate, and binding.

Second, plaintiff contends the five-year statute expired in December 2007. He claims the May 2001 extension did not expire in October 2001, as the parties stipulated. He relies upon his status conference reports and the stipulation, which state the court had stayed discovery on the reconveyance claims "pending" legislative action on the amendment to Civil Code section 2941. While the Governor signed the amending bill in October 2001, plaintiff contends the extension lasted until January 2002, when the amendment became effective. Plaintiff reasons if the May 2001 extension really ended in January 2002 and not October 2001, the August 2007 deadline should be extended accordingly.

This contention leaks like a sieve. No order in the record shows the court stayed discovery on the reconveyance claims in May 2001. The minute order for that status conference mentions no stay, and the minute order for the August 2001 hearing notes, "Discovery is not stayed" for the reconveyance causes of action. Plaintiff's

contrary characterizations of the order in his own status conference reports are unpersuasive.[3] And the parties stipulated the May 2001 extension lasted until October 2001, not January 2002. If the stipulation were ambiguous on this point — it is not — plaintiff clarified the extension's duration in his motion to declare impracticability: "The parties previously stipulated that the reconveyance claims in this case were stayed from May 30, 2001 until October 5, 2001 (129 days), which is the date on which the governor signed [the amendments] into law . . . ." Similarly, the parties stipulated the last date for timely trial was August 27, 2007, not December 2007.

Moreover, plaintiff forfeited this claim by failing to assert the December 2007 deadline below. "'[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court. [Citation.]' [Citations.] We will therefore 'ignore arguments, authority, and facts not presented and litigated in the trial court.' [Citation.] Such arguments raised for the first time on appeal are generally deemed forfeited." (*Perez, supra*, 169 Cal.App.4th at p. 590.) "Since we review a trial court's decisions concerning the applicability of the impossibility exception for abuse of discretion [citation], it would indeed be peculiar for us to determine here that the court abused discretion it was never given an opportunity to exercise." (*Id.* at p. 592.)

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[3] Even if plaintiff accurately reflected the court's order, a discovery stay does not toll the five-year statute — only a stay of "[p]rosecution or trial" does so. (§ 583.340, subds. (a), (b); but see *Bruns v. E-Commerce Exchange, Inc.* (2009) 172 Cal.App.4th 488, 497-499.) The dissent in *Bruns* cogently notes, "a partial stay of the type purportedly involved here is insufficient to toll the five-year rule because: the language of section 583.340, subdivision (b) does not use the term 'partial stay'; section 583.360, subdivision (b) does not permit any modification to the language in section 583.340, subdivision (b); and any ambiguity in that regard is resolved by the Law Revision Commission comment which cites to the *Marcus* [*v. Superior Court* (1977) 75 Cal.App.3d 204, 212-213] decision which involves a stay as to all causes of action, parties, and issues." (*Bruns*, at p. 517 (dis. opn. of Turner, P.J.).)

Third, plaintiff contends the court contributed to the delay. He claims the court should have granted his February 2007 motion to compel class notification discovery, and should have decided his class certification motion more quickly. But the court did not abuse its discretion in denying plaintiff's motion to compel. (*Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 891 ["We apply an abuse of discretion standard of review to the trial court's ruling denying a motion to compel discovery"].) "[N]otice [to class members] is not required until after the propriety of the class action has been determined." (*Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527, 1549; accord Cal. Rules of Court, rule 3.766(c) [court must decide class notice "[u]pon certification of a class, or as soon thereafter as practicable"]; cf. *Hypertouch,* at p. 1536 ["A trial court has broad discretion to determine the manner of notice in class actions"].) Plaintiff misplaces its reliance upon *Bartold,* which entitled plaintiffs to precertification "discovery necessary to support class certification." (*Bartold, supra*, 81 Cal.App.4th at p. 836.) It did not mandate precertification discovery regarding notice.

Nor did the court create impracticability in the timing of its decision on the certification motion. Plaintiff filed the motion on February 23, 2007. At an unreported telephonic status conference, the court allowed defendant to depose the named plaintiff in April and file its opposition in May, and set the hearing for June 2007. Without a transcript showing otherwise, we will not assume the court set the dates dilatorily. (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 448 [abuse of discretion not presumed in absence of reporter's transcript].) Moreover, the timeline reflects nothing more than the "ordinary incidents" of litigation. (*Perez, supra*, 169 Cal.App.4th at p. 594.) And while the court took the motion under submission after the June 2007 hearing, it issued its order only one month later. Finally, plaintiff had "'the affirmative duty to make every reasonable effort to bring [the] case to trial within five years, even during the last month of its statutory life.'" (*Id*. at p. 590.) "[T]he level of diligence required increases as the five-year deadline approaches." (*Tamburina, supra*, 147

Cal.App.4th at p. 336.) Plaintiff did not move expeditiously to notify members after the court certified the class in July 2007, but instead chose to stand on its impracticability motion. It assumed the risk the court might deny its motion.[4]

Finally, plaintiff contends the court should have commenced trial before August 27, 2007 by swearing in plaintiff as a witness. Courts have endorsed such "charades and fictions" (*Hartman v. Santamaria* (1982) 30 Cal.3d 762, 766), but not in class actions, where the need for class notice raises due process concerns about commencing phantom trials. (Cf. *Ortiz v. Lyon Management Group, Inc*. (2007) 157 Cal.App.4th 604, 623-625 & fn. 16 [class certification and notice should precede determination on the merits].) Moreover, resort to this artifice lies in the trial court's discretion, and we see no abuse if the court chose not to indulge in it.

An undercurrent to plaintiff's position is this: As long as he litigates with reasonable diligence, he may bring this case to trial at any time. Such an exception would eviscerate the five-year statute. Plaintiff must do more than engage in continuous litigation to seek excuse from the five-year statute — he must show some circumstance of impossibility or impracticability apart from the """ordinary incidents""" of litigation. (*Perez, supra*, 169 Cal.App.4th at p. 594; *Tamburina, supra*, 147 Cal.App.4th at p. 326.) This, he has failed to do.

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[4] Plaintiff wrongly insinuates the court had to grant the impracticability motion because it had invited plaintiff to file it. If anything, the court would abuse its discretion by granting a motion sight unseen. Moreover, the court is not bound by its spoken musings on a motion. Even "[a] trial court's oral ruling on a motion does not become effective until it is filed in writing with the clerk or entered in the minutes. [Citations.] Accordingly, the trial court may properly file a written order differing from its oral rulings when the rulings have not been entered in the minutes of the court." (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1170.)

DISPOSITION

The judgment is affirmed. Defendant shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.